**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Section 309(j) | ) | PP Docket No. 93-253 |
| of the Communications Act - | ) | |
| Competitive Bidding | ) | |

To: The Commission



**OPPOSITION TO PETITION FOR RECONSIDERATION**

COOK INLET REGION, INC.

Joe D. Edge
Mark F. Dever

DRINKER BIDDLE & REATH
Suite 900
901 Fifteenth Street, NW
Washington, D.C. 20005
(202) 842-8800

Its Attorneys

October 14, 1994

**SUMMARY**

Cook Inlet Region, Inc. urges the Commission to deny BET Holding, Inc.'s Petition for Reconsideration of the Commission's Order on Reconsideration and to retain the affiliation exemption announced therein. Notwithstanding BHI's assertions, the affiliation exemption promulgated by the Small Business Administration and adopted by the Commission is mandated by Congress and is a vital part of the administration of the government's unique relationship with Indian tribes and Native corporations.

Native corporations are legally-mandated aggregations of poor Native Americans. Native corporations face legal and social constraints on their ability to access traditional capital markets and to participate effectively in capital-intensive industries. They are unable to pledge their stock as collateral for loans, to issue new stock to raise funds in traditional capital markets, or to utilize the majority of the revenues from their land holdings to invest is new enterprises. In recognition of these limitations, Congress has directed the SBA to ensure that Native corporations and Indian tribes are not foreclosed from opportunities for small businesses administered by the Federal government. The Commission's affiliation rules — when applied to all categories within the entrepreneurs' blocks — follow this congressional mandate.

The affiliation rules also are critical to the effective implementation of the government's unique relationship with Native corporations and Indian tribes. For example, without the

affiliation exemption, these compelled aggregations of poor Native Americans would be foreclosed from the Commission's small business consortia rules — which permit individuals each with a net worth of $40 million to aggregate without limit, yet remain a small business. Congress has directed that Native corporations and Indian tribes are to qualify for small business programs that are governed by corporate size restrictions. The Commission's affiliation rules implement this unique relationship.

The Commission's affiliation rules also are consistent with the Federal trust responsibility toward tribes and Native corporations. Congress has directed that these entities are to qualify for small business programs limited to businesses with $6 million in net worth and $2 million in net revenue. Since the Commission has no expertise with Native Americans, Native corporations, or Indian tribes, the Commission has an obligation to ensure that its rules implement established Federal policy in that area. The Commission's affiliation rules fulfill this mandate.

Finally, the adoption of the affiliation rules by the Commission was consistent with the requirements of the Administrative Procedure Act. The affiliation rules are a logical outgrowth of the Commission's small business rules and are fully supported by the record in this proceeding. The affiliation exemption announced in the Order on Reconsideration should be maintained, and BHI's Petition for Reconsideration should be denied.

## TABLE OF CONTENTS

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Section 309(j) of the Communications Act - Competitive Bidding | ) | PP Docket No. 93-253 |

To: The Commission

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), submits this Opposition to the Petition for Reconsideration of the Commission's Order on Reconsideration[1] filed on September 21, 1994 by BET Holdings, Inc. ("BHI"). CIRI is an Alaska Native corporation organized pursuant to the Alaska Native Claims Settlement Act ("ANCSA") and an Indian tribe for all purposes before the Commission.

## I. INTRODUCTION

Native corporations such as CIRI are unique social and economic aggregations created by Congress. As such, Native corporations are subject to a wide range of Federally-mandated economic restrictions that limit their ability to compete in the marketplace. While other minority-owned businesses can issue debt and equity securities, and pledge their assets and securities to raise capital, the real and personal property

---

1. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, FCC 94-217 (rel. Aug. 15, 1994) ("Order on Reconsideration").

interests held by Native corporations are subject to a number of constraints — both legal and cultural — that affect their ability to manage and dispose of property.

In recognition of the substantial disadvantages faced by Native corporations, the special duties owed Indian tribes by the Federal government, and a clear congressional mandate, the Commission clarified its rules in the Order on Reconsideration to exempt from affiliation coverage entities owned and controlled by Indian tribes or Alaska Regional or Village corporations in determining entrepreneurs' block eligibility for broadband personal communications services ("PCS").[2] Specifically, the clarification adopted a Small Business Administration ("SBA") affiliation rule for Indian tribes and Native corporations designed to ensure that these "unique aggregations" would not be foreclosed from government benefits for economically and socially disadvantaged groups simply because Congress requires that tribal assets be communally owned.[3] The effect of this amendment was to make the Commission's Rules consistent with the remainder of the SBA affiliation rules adopted by the Commission for the PCS auctions, as well as with other Federal laws, policies, and regulations regarding treatment of Indian tribes.[4]

---

2. Order on Reconsideration at ¶¶ 5-7.

3. Order on Reconsideration at ¶¶ 5-6.

4. Order on Reconsideration at ¶ 5. CIRI filed a Petition for Further Clarification on September 7, 1994 asking the Commission clearly to confirm that the affiliation exemption adopted in the Order on Reconsideration not only excludes

BHI has challenged the Commission's adoption of the SBA's affiliation rule for Indian tribes and Native corporations by arguing that Federal legislation makes no distinctions between Native American-owned entities and entities owned by other minorities. However, BHI's challenge overlooks the unique relationship between Indian tribes and Native corporations on one hand, and the Federal government on the other.

In carrying out the Federal government's unique responsibilities towards Native Americans, Congress not only has authorized the Commission's affiliation exemption for Native corporations and Indian Tribes, but it has mandated them. The Commission's rules merely follow this congressional dictate. Moreover, the affiliation rules are rationally constructed to implement the Federal government's obligations towards Indian tribes and Native corporations and are consistent with other Federal policies. Finally, the Commission's adoption of the affiliation rules was consistent with the requirements of the Administrative Procedure Act ("APA") and was supported by the record in this proceeding. Accordingly, BHI's challenge must fail.

---

concerns owned and controlled by tribes and Native corporations from the Commission's definition of affiliate for the purposes of determining eligibility to bid in the broadband PCS entrepreneurs' blocks, but also excludes such entities from the affiliation rules for the purposes of determining whether an entity qualifies for small business preferences with the entrepreneurs' blocks. To CIRI's knowledge, no party has opposed its September 7 Petition for Further Clarification, and no party other than BHI has opposed the affiliation exemption announced in the Order on Reconsideration.

## II. THE COMMISSION'S AFFILIATION RULES ARE MANDATED BY CONGRESS

BHI's contention that the affiliation rule adopted by the Commission lacks statutory authority ignores the statutory authority explicitly relied upon by the Commission in the Order on Reconsideration. The Budget Act directs the Commission "to ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[5] Section 29(e) of ANCSA specifically provides that entities owned and controlled by Native corporations shall be treated as a "minority and economically disadvantaged business" for all purposes of Federal law.[6] Thus, because Congress has directed the Commission to ensure the participation of minority-owned businesses, and because Congress has defined "minority and economically disadvantaged business" to include Native corporations for all purposes of Federal law, the Commission must accord affiliates of Native corporations full opportunity to participate in the auction of broadband PCS licenses.

Further, consistent with ANCSA, Federal law directs the SBA to determine the size of entities owned by Indian tribes and Native corporations without regard to the entities' parent affiliations:

> In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe

---

5. 47 U.S.C.A. § 309(j)(4)(D) (West Supp. 1994).

6. 43 U.S.C.A. § 1626(e)(2) (West Supp. 1994).

> (or a wholly owned business entity of such tribe), each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe . . . .

15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1994). Thus, the SBA affiliation rule adopted by the Commission in the Order on Reconsideration merely follows these express congressional mandates.

## III. THE AFFILIATION RULES ARE RATIONALLY CONSTRUCTED TO IMPLEMENT THE FEDERAL GOVERNMENT'S UNIQUE RELATIONSHIP WITH INDIAN TRIBES AND NATIVE CORPORATIONS

In arguing that the affiliation rules favor one group of minorities over another, BHI misconstrues the content of the Commission's Order. Contrary to BHI's assertions, the rules do not distinguish between various minority group members or provide Native American minorities with advantages not afforded other minorities. As recognized expressly by the Commission, applicants owned or controlled by individual Native Americans — rather than by Indian tribes or Native corporations — will stand on the same footing as applicants composed of members of other minority groups.[7]

Instead, the affiliation exemption employed by the SBA and adopted by the Commission ensures that the Federally-mandated communal ownership of the assets held by Indian tribes and Native corporations will not deny applicants owned and controlled by these entities the same opportunity to participate in spectrum-

---

7. Order on Reconsideration at ¶ 7.

based services provided to other minority-owned businesses. As the Commission noted in the Order on Reconsideration, Congress mandated the tribal exemption from the affiliation rules that govern eligibility for SBA programs because Indian tribes and Native corporations represent "unique aggregations of very limited capital of historically disadvantaged people" with whom the Federal government has a unique and continuing relationship and responsibility.[8] These unique aggregations are mandated by the Federal government.[9] The affiliation exemption merely "evens the playing field" for Native corporations.

For example, the Commission's broadband PCS entrepreneurs' block rules provide that small businesses may form consortia of unlimited size that, regardless of their aggregate available resources, will still qualify as small businesses and will still be eligible for all of the entrepreneurs' block small business preferences.[10] In the absence of the affiliation exemption

---

8. Order on Reconsideration at ¶ 6 (emphasis added).

9. CIRI, for instance, is owned by approximately 6,800 Athabascan, Eskimo, and Aleut shareholders, a majority of whom are women and a majority of whom have an annual income below the Federal poverty level. BHI, in contrast, is owned by a consortium that includes an individual minority group member with an estimated net worth in excess of $100 million. Other owners of BHI include Time Warner Inc., Tele-Communications, Inc., Lehman Brothers, Bank of America, and Donaldson, Lufkin & Jenrette. These facts alone show that BHI very successfully has accessed traditional capital markets and has not faced the unique barriers to capital suffered by tribal entities.

10. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, FCC 94-178, ¶¶ 179-80 (rel. July 15, 1994).

announced in the Order on Reconsideration, Native corporations would not be afforded similar treatment. The small business consortia rule would confer upon non-Native Americans a substantial competitive advantage not available to Federally-mandated aggregations of genuinely poor Native Americans.[11] That cannot have been within the intent of Congress.

Moreover, while the financial statements of some Native corporations appear to reflect substantial total net worth, the characteristics of tribal ownership and the restrictions and inherent obligations on tribal assets — all of which arise from the operation of Federal law — limit both the value of those assets and the tribe's access to capital. Thus, while other minority-owned businesses can issue debt and equity and pledge their assets and securities to raise capital,[12] the real and personal property interests held by Indian tribes and Native corporations are subject to numerous constraints, both legal and cultural, that affect their ability to manage and dispose of their property.

---

11. Indeed, it would be nonsensical for the Commission to permit individuals (or small businesses) with a net worth of $40 million each to aggregate without limit, while legally-mandated aggregations of disadvantaged persons could not.

12. According to recent news reports, BHI — or its principal shareholder/CEO (whose net worth exceeds $100 million) — will once again access the capital markets to fund construction of a $150 million sports stadium in the Washington, DC area. See Paul Farhi & Mike Mills, Cable CEO Vows D.C. Arena Drive, Wash. Post, Oct. 1, 1994, at A1. See also Paul Farhi, Johnson's Dream of a Team, Wash. Post, Aug. 22, 1994, at Wash. Business 1, 16-17.

For example, Native corporation stock cannot be sold, pledged, mortgaged, or otherwise encumbered.[13] Native corporations thus are precluded from two important means of access to the capital markets enjoyed by virtually every other corporation: (1) the ability to pledge stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities to raise capital. Because creditors cannot obtain access to the stock and control of the corporation, and because the corporations cannot take advantage of public market financing through many forms of traditional securities offerings, they are precluded from raising capital that is freely available to non-tribal entities — whether those entities are large or small, minority-owned or non-minority owned.

Second, land holdings often constitute one of the most important parts of tribal and Native corporation assets. However, these holdings are subject to legal restraints that severely limit their actual economic value and preclude their use as collateral for purposes of raising capital. Most tribal lands are owned in trust by the Federal government or are subject to a restraint on alienation in the government's favor. In the case of a Native regional corporation like CIRI, 70 percent of the revenue it derives from the subsurface estate and timber resources of ANCSA land must be shared among all twelve regional

---

13. 43 U.S.C.A. § 1606(h) (West Supp. 1994).

corporations.[14] Thus, CIRI cannot keep the majority of the revenues it derives from such ANCSA holdings, and cannot use those revenues as a basis for raising capital.

Moreover, Native lands form an important part of the cultural heritage of the tribal entities and provide a valuable base for subsistence activities of their members. These cultural values themselves operate to restrain sale, development, and access to capital.[15]

In addition to these considerations, tribally-owned businesses are unique in another fundamental way. Although CIRI is a business corporation, it has as its primary mission improving the social and economic lives of its Native shareholders. Thus, a far larger percentage of CIRI revenues are distributed to its shareholders than is typically the case with other corporations of any size. For example, each year CIRI typically distributes more than 50 percent of its net income in

---

14. 43 U.S.C. § 1606(i) (1988).

15. The cumulative effect of these restraints on the management and development of ANCSA tribal property is similar to the effect of outright statutory restraints on alienation often applied to tribal property:

> As a result of these restraints [on alienation], as well as the common law theory that the execution of a mortgage in fact conveys an interest in the property, tribes are practically precluded from giving a mortgage on tribal land. Tribes frequently have had difficulty securing development capital in the private money market because they could not effectively mortgage their single largest asset: their land base.

Felix S. Cohen, Handbook of Federal Indian Law 520 (repr. 1982) (1942) (emphasis added).

cash dividends to its shareholders (most of whom use these dividends for basic food, clothing, and shelter). CIRI also supports a number of social programs providing services ranging from health care and job training to cultural heritage and education projects. Other companies — large or small — simply do not perform these functions.

To help compensate for limitations on tribes' access to credit and capital, Congress has implemented a number of statutory remedies, including the removal of restrictions on a tribe's ability to participate in Federal programs providing economic development opportunities for minorities burdened in their access to credit.[16] Where preference programs exist for disadvantaged segments of the population, and where eligibility for those programs is limited in part by the size of a business's gross revenues, Congress has found that special treatment is appropriate for entities whose access to capital is subject to serious legal and practical impediments, and who must dedicate significant revenues and efforts to improving the social and economic lives of their disadvantaged members. Similarly, only by maintaining the exemption set forth in its Order on Reconsideration — for the reasons set forth therein — can the Commission ensure that applicants controlled by Indian tribes and Native corporations will have a full and equal opportunity to participate in spectrum-based services.

---

16. See 43 U.S.C.A. § 1626(e) (establishing the eligibility of Native corporations for, inter alia, the SBA 8(a) Program).

## IV. THE AFFILIATION RULES ARE CONSISTENT WITH THE FEDERAL TRUST RESPONSIBILITY TOWARD NATIVE AMERICANS

In arguing that the affiliation rules are impermissible, BHI's challenge overlooks the Federal government's trust responsibility toward Native Americans. This important governmental duty applies to every Federal agency that may deal with Native Americans — including the Commission — and "imposes strict fiduciary standards on the[ir] conduct."[17]

This policy has been expressed by Congress in a variety of legislative contexts. The most relevant area is the Section 8(a) program contained in the Small Business Act[18] — the program from which the Commission's affiliation rules derive. Under the SBA program, small businesses are granted numerous advantages including, among other things, exclusive bidding access to certain government contracts.[19] The definition of "small business" includes entities with no more than $6 million in net worth and $2 million in net income.[20] As with the Commission's entrepreneurs' block rules, if a company is affiliated with another entity, the second entity's assets and revenues are counted toward the $6 million/$2 million calculation.[21] As noted above, however, the Small Business Act directs the SBA to

---

17. Cohen, Handbook of Federal Indian Law at 225.

18. 15 U.S.C.A. §§ 631-56 (West Supp. 1994).

19. 15 U.S.C.A. § 637(1)(D)(ii) (West Supp. 1994).

20. 13 C.F.R. § 121.802(a)(2)(i) (1994).

21. 13 C.F.R. § 121.401(a) (1994).

determine the size of a concern owned by an Indian tribe without regard to its affiliation with the tribe.[22] Congress thus considers a concern owned by a tribe — regardless of the tribe's total revenue and assets — to qualify under the SBA's $6 million/$2 million standard. To be certain, this is a far more restrictive standard than the Commission's $40 million net worth test for small businesses. It makes little sense, therefore, to recognize a tribe as a small business for the $6 million/$2 million standard, but not for the $40 million test.

It is hornbook law that Federal agencies such as the Commission are under an obligation to regulate in the public interest and to ensure that its actions are consistent with other Federal policies — particularly in areas outside of its expertise. As the D.C. Circuit noted:

> Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest . . . . [A]gencies should constantly be alert to determine whether policies might conflict with other federal policies and whether such conflict can be minimized.[23]

The Commission's affiliation rules fall squarely within these administrative guidelines. The Commission has no unique expertise in Native American matters, and until now, no

---

22. 15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1994).

23. LaRose v. F.C.C.,, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). See also Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (D.C. Cir. 1971) (noting the FCC's duty to regulate in the public interest).

experience with a preference program in the nature of the SBA's 8(a) program. Moreover, the affiliation rules directly concern Native American corporations such as CIRI and, thereby, invoke the Federal trust responsibility. Thus, the Commission has a particular obligation to ensure that its rules implement established Federal policy — Federal policy that has been articulated clearly by the SBA and by Congress. BHI's suggestion that the affiliation rules are somehow impermissible flies directly in the face of this mandate.

## V. THE COMMISSION'S ADOPTION OF THE AFFILIATION RULES WAS CONSISTENT WITH THE REQUIREMENTS OF THE APA AND WAS SUPPORTED BY THE RECORD IN THIS PROCEEDING

BHI maintains that the Commission has violated the provisions of the Administrative Procedure Act ("APA") by employing the Small Business Administration's ("SBA's") affiliation rules "without offering interested parties an opportunity to express their views."[24] BHI also asserts that there is no record support in this proceeding for exempting Indian tribes and Native corporations from the Commission's affiliation rules.[25] It is apparent, however, that the Commission has not deviated from the requirements of the APA.

### A. Adoption of the Affiliation Rules was the Logical Outgrowth of the Commission's Proposed Rules

Section 4(a) of the APA requires the Commission to include in a notice of a proposed rule "either the terms or substance of

---

24. BHI Petition at 3.

25. Id. at 3-5.

the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1988) (emphasis added). In this regard, it is well settled that a notice of proposed rulemaking need not present an entire final rule. As the U.S. Court of Appeals for the District of Columbia Circuit has recognized, "A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

Rather, to comply with the requirements of the APA, the agency's final rule must be a "logical outgrowth" of its proposed rule. Shell Oil Co. v. EPA, 950 F.2d 741, 746-47 (D.C. Cir. 1991); Natural Resources Defense Council, Inc. v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988); Small Ref. Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983); United Steelworkers v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

For example, in Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991), the D.C. Circuit held that parties before the Commission should have anticipated that the Commission would require satellite service applicants to contribute funds to a consortium to demonstrate financial eligibility. The Commission had expressed general interest in a multi-party approach to satellite funding in the NPRM and had referenced a previously used joint ownership model. Id. at 446. Thus, the Commission's

final rule — mandating a $5 million cash contribution to a joint ownership consortium — was a logical outgrowth of the financial qualification rules set out in the NPRM. Id.

The same is true in the instant matter. In the Notice of Proposed Rulemaking in this proceeding, the Commission clearly evidenced an interest in and requested comment on the small business definitions promulgated by the SBA.[26] Implicit in any definition of a small business is a determination of who and what should be included. For this reason, the SBA small business definitions all include affiliation analysis. Indeed, the Commission referenced the affiliation analysis for the SBA industrial classification size standard in a footnote to the discussion in the Notice of Proposed Rule Making.[27]

Moreover, the Commission discussed the SBA affiliation rules at some length in its Second Report and Order in response to concerns by several commenters that established corporations could spin off companies to qualify for small business preferences.[28] There, the Commission asserted, "[W]e intend to scrutinize relationships between parties very carefully to

---

26. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Notice of Proposed Rule Making, 8 FCC Rcd 7635, 7647 (1993) ("Notice of Proposed Rule Making").

27. Id. at 7647 n. 51. It appears that BHI did not file comments or reply comments on the Commission's Notice of Proposed Rule Making, however.

28. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2395-96 (1994) ("Second Report and Order").

determine if they rise to the level of affiliation," and cited expressly several provisions from the SBA affiliation rules.[29] Nevertheless, in its Petition for Reconsideration[30] of the Second Report and Order and in its subsequent Comment on Petitions for Reconsideration,[31] BHI nowhere addresses the application of the SBA affiliation rules set forth in the Second Report and Order.

In short, the use of the SBA's affiliation rules plainly is the logical outgrowth of the small business definitions proposed by the Commission in the Notice of Proposed Rulemaking and of the comments received from a number of parties to the proceeding thereafter. The affiliation rules are an integral part of the SBA's small business analysis, they were referenced in the Commission's Notice of Proposed Rulemaking, and they were employed in the Second Report and Order in response to concerns articulated by a number of commenters. Moreover, the Commission has noted that the SBA affiliation rule exempting Indian tribes and Alaska Native Corporations from affiliation coverage is an established part of the SBA's affiliation regime.[32] Use of that exemption in the Commission's affiliation analysis unquestionably is a logical outgrowth of the Commission's reliance on the other SBA rules. Thus, the procedure by which the Commission adopted

---

29. Id. at 2396.

30. BHI Petition for Reconsideration (filed June 3, 1994).

31. BHI Comment on Petitions for Reconsideration (filed June 29, 1994).

32. Order on Reconsideration at ¶ 4.

the SBA affiliation rules was consistent with requirements of Section 4(a) of the APA.

### B. The Record in this Proceeding Supports the Use of the SBA's Affiliation Exemption

Similarly, the record in this proceeding supports the Commission's adoption of the SBA affiliation exemption rule. For example, the record contains, inter alia, the testimony of CIRI Senior Vice President Margaret Brown given on May 20, 1994 before the Subcommittee on Minority Enterprise, Finance and Urban Development. Presented to Chairman Mfume and the Subcommittee long before the Commission refined its affiliation rules, Ms. Brown's testimony describes the historical and socioeconomic underpinnings of ANCSA and the role that Native corporations play in the social and economic lives of their shareholders. Ms. Brown also discusses the problems that plague Alaska Natives today and the continuing need to see that Natives and Indian tribes are not foreclosed from meaningful economic opportunities.

This testimony has been part of the record since May and was cited by the Commission in the Order on Reconsideration.[33] Indeed, BHI quotes portions of Ms. Brown's testimony in its Petition for Reconsideration[34] and discusses statements of Chairman Mfume and testimony of other witnesses before the

---

33. Order on Reconsideration at ¶ 6 n.13.

34. BHI Petition at 8.

Subcommittee in previous BHI pleadings.[35] In concert with the broad congressional mandate to see that Native corporations and Indian tribes are not excluded from the SBA programs adopted by the Commission and the congressional determination that Native Corporations and Indian tribes are to qualify under small business standards more stringent than the Commission's, this record plainly supports the Commission's inclusion of the SBA affiliation exemption.

Finally, failure to enact these rules would have run counter to the Commission's obligations under Federal law. As recognized in LaRose v. FCC, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974), agencies are under a duty to determine whether their rules might conflict with other Federal policies and whether such conflict can be minimized. Failure to adhere to this requirement raises the real possibility that the agency's action would be arbitrary and capricious and unsupported by the record in the proceeding. By maintaining the SBA's affiliation rules in the instant matter and by clarifying that the affiliation exemption applies to the small business standards of the Commission's entrepreneurs' block rules, the Commission can avoid such a result and ensure that its rules are consistent with established Federal policy.

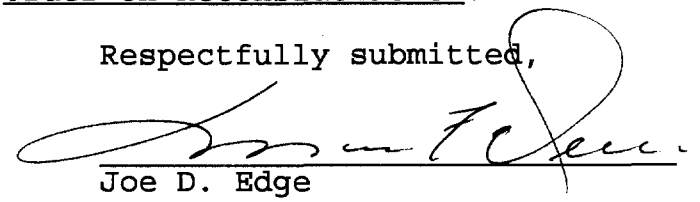
---

[35] BHI Petition for Reconsideration and Clarification at 3 n.3 (filed June 3, 1994); BHI Petition for Reconsideration and Clarification at 10 n.14 (filed Aug. 22, 1994).

## VI. CONCLUSION

For these reasons, CIRI urges the Commission to deny BHI's Petition for Reconsideration of the affiliation exemption adopted by the Commission in the Order on Reconsideration.

Respectfully submitted,



Joe D. Edge
Mark F. Dever

DRINKER BIDDLE & REATH
901 Fifteenth Street, NW
Suite 900
Washington, D.C. 20005
(202) 842-8800

Attorneys for
COOK INLET REGION, INC.

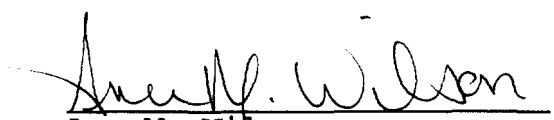
October 14, 1994

**CERTIFICATE OF SERVICE**

I, Ann M. Wilson, hereby certify that on this 14th day of October, 1994, the foregoing Opposition to Petition for Reconsideration was delivered by hand to the following parties:

Debra L. Lee, Esq.
Maurita K. Coley, Esq.
Black Entertainment Television
1232 31st Street, N.W.
Washington, D.C. 20007

Leonard J. Kennedy, Esq.
Richard S. Denning, Esq.
Mark I. Lloyd, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037



Ann M. Wilson